76-4771

Supreme Court, U. S.
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OCT 4 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976
No. 76-

MARY F. McNAMARA and ANARITA McNAMARA,

Petitioners

Versus

~~IN RE: CONDEMNATION OF LANDS IN CITY OF SCRANTON, COUNTY OF LACKAWANNA, STATE OF PENNSYLVANIA~~

and

TCS-1, et al. Respondents

~~*Intervening Appellee*~~

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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18824
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TABLE OF CONTENTS

	PAGE
Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania	1
Opinions Below	2
Jurisdiction	4
Questions Presented	5
Constitutional Provisions	6
Statement of the Case	7
Reasons for Granting the Writ:	
Where essential facts appear necessary by reason of Petitioners' presenting preliminary objections to the court which are verified and endorsed with a "notice to plead" requiring an answer by the respondent in such case under Pennsylvania law the verified facts are admitted by the respondent and when the court precludes testimony or depositions and dismisses preliminary objections "for lack of merit on their face" such action by the court is a denial of the Petitioners' right of equal protection of laws under the Fourteenth Amendment and should result in remanding the case to the Lackawanna County Court	9
Conclusion	11
APPENDIX:	
Letter From Prothonotary of Supreme Court of Pennsylvania	1a
Opinion: United States District Judge Muir	2a

Preliminary Objections in Lackawanna County Court 4a
Order of Lackawanna County Court 8a
Order of Commonwealth Court 9a

TABLE OF CASES AND AUTHORITIES

CASES:*

Firing v. Kephart, 336 A.2d 470, 18 Pa. Commonwealth Ct. 578 (1975) 10
Schaffer v. Batyko, 227 Pa. Superior Ct. 62 (1974) 9
Standard Machine and Equipment Company v. Hartford Accident & Indemnity Co., 70 D. & C. 2d 110 (1974) 10

RULES:

Pennsylvania Rules of Civil Procedure, 1017 9
Pennsylvania Rules of Civil Procedure, 1028(c) .. 5, 9

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, Amendment XIV 5, 6, 11

JURISDICTION OF SUPREME COURT:

28 U.S.C. 1257(3) 4

*Please note that only procedural cases reported subsequent to 1974 are cited as authorities.

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

MARY F. McNAMARA and ANARITA McNAMARA,

Petitioners

versus

IN RE: CONDEMNATION OF LANDS IN CITY OF SCRANTON, COUNTY OF LACKAWANNA, STATE OF PENNSYLVANIA

and

TCS-1

Intervening Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioners, Mary F. McNamara and Anarita McNamara, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania affirming the judgment of the Court of Common Pleas of Lackawanna County, Pennsylvania.

OPINIONS BELOW

The Petitioners appeal to the Commonwealth Court of Pennsylvania No. 1522 C. D. 1974 in order to review the decision of the Common Pleas Court of Lackawanna County, Pennsylvania dismissing their preliminary objections to a rule of possession averring that the condemning authority was estopped to acquire the previously condemned property by reason of the fact that the Scranton Redevelopment Authority had previously published a statement that they did not choose to take title to the McNamara property. The Lackawanna County Court dismissed the Petitioners' preliminary objections "for lack of merit on their face," The preliminary objections presented to the Lackawanna Court are printed in the appendix to this petition at pages 4a-7a. The order of the Lackawanna County Court is printed in the appendix to this petition at page 8a. This order was not printed in any official report.

An appeal to the Commonwealth Court of Pennsylvania resulted in an affirmance of the Lackawanna County Court judgment. The affirming judgment of the Commonwealth Court of Pennsylvania is printed in the appendix to this petition at page 9a. There was no publication in any official report of this judgment.

The Petitioners filed a timely petition for allowance of appeal to No. 2153 Allocatur Docket in the Supreme Court of Pennsylvania.

By letter dated July 12, 1976 the Prothonotary of the Supreme Court of Pennsylvania informed petitioners' counsel that the court had entered the following order on the petition for reconsideration of denial of petition for allowance of appeal from the Commonwealth Court of Pennsylvania: "July 8, 1976: Petition Denied. Per Curiam". This order is printed in the appendix of this petition at page 1a.

This order was never published in any official report.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 28, 1976. A timely petition for reconsideration resulted in the letter of July 12, 1976 informing Petitioners' counsel that the Court had entered the following order on the petition for reconsideration of denial of petition for allowance of appeal from Commonwealth Court: "July 8, 1976 Petition Denied. Per Curiam".

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3). Petitioners are citizens of the United States.

QUESTIONS PRESENTED

A. Whether an error which affected Petitioners' substantial Fourteenth Amendment Due Process Rights of Equal Protection of Laws was violated by the Lackawanna County Court precluding any testimony or depositions to rebut or verify the facts admitted by the Condemnors' failure to answer the verified facts in the Petitioners' preliminary objections which were endorsed with a "notice to plead" as required by Rule 1028 (c) (P. R. C. P.), approved by the Supreme Court of Pennsylvania?

B. Whether the Petitioners were denied their Fourteenth Amendment Due Process Rights to a Fair Trial when the Court precluded any testimony or depositions?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 10, 1972 Petitioners joined with other condemnees of the Scranton Redevelopment Authority to assert a class action with the purpose in mind of acquiring a just result for members of the class action and applied for an injunction to stop further actions of the Redevelopment Authority. This case resulted in an unfavourable judgment to the petitioners except for the fact that the judgment of that court required that Scranton Redevelopment Authority conform to federal laws, i.e. that the Petitioners would be entitled to all of the benefits of the federal laws prior to acquisition of the Petitioners' property. The judgment of that court is printed in the appendix of this petition at pages 2a-3a. The Petitioners are unable to locate any printed publication of that judgment.

In an action filed to 15 November Term, 1973,TCS-1, a non-profit corporation sued the Scranton Redevelopment Authority to acquire the Petitioners' lot in specific performance of a contract made November 12, 1969 for the purchase price of $1000.00 when the house would be demolished. The Petitioners aver that the contract for which TCS-1 was suing the Scranton Redevelopment Authority contains a clause which can terminate that contract by a registered letter.

From June 27, 1972, the date of the United States District Court Judge Muir's decision until September 30, 1974, the only action taken by the Scranton Redevelopment Authority was negotiation to attempt to relocate the

Petitioners' Victorian home on some other lot which the Petitioners approved. The Petitioners approved removal of house to a specific lot and immediately the Scranton Redevelopment Authority concluded negotiations without any action on removal of house. Since the handing down of Judge Muir's decision the Scranton Redevelopment Authority has represented to your Petitioners that they would not be able to conform to the requirements of federal law and, therefore, did not choose to acquire the McNamara property by eminent domain.

It is noted that TCS-1, a non-profit corporation, has no legal authority to acquire property by exerting the right of eminent domain. However, TCS-1, as an intervening appellee, since Commonwealth Court, has taken control of all legal actions in the Commonwealth Court and in the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT

Where essential facts appear necessary by reason of Petitioners' presenting preliminary objections to the court which are verified and endorsed with a "notice to plead" requiring an answer by the respondent in such case under Pennsylvania law the verified facts are admitted by the respondent and when the court precludes testimony or depositions and dismisses preliminary objections "for lack of merit on their face" such action by the court is a denial of the Petitioners' right of equal protection of laws under the Fourteenth Amendment and should result in remanding the case to the Lackawanna County Court.

***Schaffer v. Batyko*, 227 Pa. Superior Ct. 62 (1974) held that "Where an inquiry into essential facts appears necessary, a party should not be deprived of the opportunity of presenting the disputed facts to a fact finder. . ." (Citations omitted.)**

"A court shall determine promptly all preliminary objections. If an issue of fact is raised, the court shall take evidence by deposition or otherwise. P.R.C.P. 1028-(c). A preliminary objection is a pleading and an answer to it is equivalent to a defendant's answer to a plaintiff's complaint subject to all the rules of pleading of the complaint. P.R.C.P. 1017. In the instant case the insurance company endorsed its preliminary objections requiring an answer from the plaintiff. The plaintiff answered, alleging facts which, if true, could very well protect plaintiff against dismissal of his cause of action. In the light of the

affidavit of acceptance of service it appears that the insurance carrier had no authority or permission from defendant to attack the lack of service of the complaint. *This matter together with other allegations set forth in plaintiff's answer should have been looked into by the lower Court.*" (Emphasis supplied.)

The Petitioners supplied emphasis to demonstrate that it is still required by the law of Pennsylvania to accept testimony or depositions in order to determine any disputed facts made necessary by the preliminary objections.

If the Lackawanna County Court had allowed Petitioners to produce depositions or testimony to prove the facts necessary to estop the condemnor there would not be any need for further litigation.

Standard Machine & Equipment Company v. Hartford Accident & Indemnity Co., 70 D. & C. 2d 110 (1974), held that preliminary objections endorsed with a notice to plead, required a responsive reply by the other party, unless the properly pleaded averments of fact are to be taken as admitted.

Firing v. Kephart, 336 A.2d 470, 18 Pa. Commonwealth Ct. 578 (1975), holds that when the sustaining of defendant's preliminary objections will result in a denial of plaintiffs' claim or dismissal of plaintiffs' suit, preliminary objections should be sustained only in cases which are clear and free from doubt.

The instant case is one which would be clear and free from doubt in the event the Lackawanna County Court allowed depositions or testimony in order to prove the averred facts.

CONCLUSION

Petitioners were denied their Fourteenth Amendment right of equal protection of laws in that under the case law of Pennsylvania "a party should not be deprived of the opportunity of presenting the disputed facts to a fact-finder". Because substantial questions have been raised in this case concerning constitutional questions, the fair administration of civil law, the Petitioners respectfully request this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

HENRY M. BIGLAN,
Attorney for Petitioners

Order of Supreme Court of Pennsylvania

SUPREME COURT OF PENNSYLVANIA
Eastern District

Sally Mrvos
Prothonotary
Laura E. Litchard
Deputy Prothonotary

Philadelphia 19107
July 12, 1976

Henry M. Biglan, Esq.,
Star Route
Hop Bottom, Pa. 18824

In re: Condemnation of Lands in City of Scranton, County of Lackawanna, State of Pennsylvania, and TCS-1
Intervening Appellee.
Petition of: Mary F. McNamara
No. 2153 Allocatur Docket

Dear Mr. Biglan:

Please be advised that the Court has entered the following Order on the Petition for Reconsideration of Denial of Petition for Allowance of Appeal from Commonwealth Court, in the above captioned matter:

"July 8, 1976
Petition Denied
Per Curiam"

Very truly yours,
(s) Sally Mrvos
L.
Prothonotary

SMM:mb

CC: Leo A. Southard, Esq.,
Joseph E. Gallagher, Esq.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civ. 71-415

Anarita McNamara for Herself and for All Others Similarly Situated

and

Mary F. McNamara, for Herself and for All Others Similarly Situated

vs.

Department of Housing and Urban Development, an Agency of the United States

and

George Romney, Secretary, Department of Housing and Urban Development

and

Warren P. Phelan, Regional Administrator, Region III

and

Scranton Redevelopment Authority, Edward Cosgrove, Chairman, Donald Harris, Executive Director

---

OPINION

Muir, District Judge.

* * * * * * *

Title II of the Uniform Relocation Act, which deals with relocation assistance, does apply to any displacement occurring on or after the effective date of the Act. The

plaintiffs would be entitled to the assistance and benefits provided for under Title II. There has been no allegation in the Complaint, nor any evidence adduced at trial, to indicate that the Authority has not made any payments to any displacee to which he was entitled.

Section 205 (c) of the Uniform Relocation Act sets forth the requirements for a relocation advisory program. These provisions are substantially similar to the requirements of Section 105 (c) (1) of the Housing Act of 1949. The Authority must provide services to its displacees as so prescribed. When the question of the right of the Authority to take plaintiffs' property is finally settled, plaintiffs will be entitled to these services.

Plaintiffs have not produced a single displacee who has not been provided with the resources, services, or benefits to which he is entitled.

* * * * * * * *

Muir,
United States District Judge

Dated: June 27, 1972

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

No. 562 March Term, 1969

In Re: Condemnation of Lands in City of Scranton, County of Lackawanna, State of Pennsylvania

Mary F. McNamara and Anarita McNamara, 518 Adams Avenue, Ward 9, Block 30, Lots 16A & 17

PRELIMINARY OBJECTIONS

MOTION TO STRIKE OFF PLEADING:

1. The Condemnor has no legal right to sue for possession until it has conformed to the mandate of the Federal Statute 91-646 (Uniform Relocation Assistance and Real Property Assistance Act of 1970.)

CONDEMNOR IS ESTOPPED TO ACQUIRE POSSESSION:

2. After becoming Chairman of the Board of the Scranton Redevelopment Authority, Mr. James McNulty confirmed to Attorney Henry M. Biglan that the Scranton Redevelopment Authority did not choose to take title to the McNamara property. He stated that the statement attributed to him in the newspapers was accurate.

3. The entity known as TCS-1 is not registered in Lackawanna County or Harrisburg as a corporation and therefore did not have the legal power to enter into a contract with the condemnor to buy the McNamara land.

4. Negotiations with the Condemnor:

The Condemnees would have agreed to remove the McNamara building to the Brooks lot in the four hundred block of Jefferson Avenue. This was made impossible by reason of the fact that the Scranton Redevelopment Authority told the Condemnees and their attorney that the Brooks lot would be unavailable because that lot was part of the Brooks estate. The Condemnees now have learned that said Brooks lot has been sold to John Kelly, a former Member of Scranton Neighbors and presently real estate agent for Midtown Apartments which were built by Scranton Neighbors.

Later the Scranton Redevelopment Authority offered to move the McNamara building to one of the Munchak lots in the four hundred block of Jefferson Avenue, but The Authority has failed to do so.

All other attempts to remove the McNamara house to another lot failed by reason of the S.R.A.'s inactivity.

5. The Condemnees objected to the fact that the Eminent Domain Code is unconstitutional, but this question has never been ruled upon by the courts.

(s) Henry M. Biglan
Attorney for Condemnees.

County of Lackawanna,
Commonwealth of Pennsylvania.

Henry M. Biglan swears to the truth of all the facts appearing in Paragraph 2 and Paragraph 3.

(s) Henry M. Biglan

In Witness Whereof, I hereunto set my hand and official seal.

(s) Carolyn Saar,
Notary Public

My Commission Expires Feb. 16, 1978
Office at Scranton, Lackawanna
County, Pa. (Seal)

County of Lackawanna,
Commonwealth of Pennsylvania

Mary F. McNamara swears to the truth of all the facts appearing in Paragraphs 4 and 5.

(s) Mary F. McNamara

In Witness Whereof, I hereunto set my hand and official seal.

(s) Carolyn Saar,
Notary Public

My Commission Expires Feb. 16, 1978
Office at Scranton, Lackawanna
County, Pa. (Seal)

[Endorsed:]
IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

No. 562 March Term 1969

In Re: Condemnation of Lands in City of Scranton
County of Lackawanna
State of Pennsylvania.

Mary F. McNamara and Anarita McNamara, 518 Adams Avenue, Ward 9, Block 30, Lots 16A & 17

PRELIMINARY OBJECTIONS

ORDER

To the Within Named Defendant (s): (Condemnor)

You are hereby notified to plead to the within Complaint within 20 days from the date of service hereof. You are hereby warned that if you fail to enter an appearance and file and ANSWER as above notifed and required, the cause will proceed without you, and you will be liable to have judgment entered against you in your absence.

(s) Henry M. Biglan
Attorney for Plaintiff
Condemnee
Ray A. Alberigi
Prothonotary,
Lackawanna County
1974 Oct 17 PM 4 27

Order of County Court

IN THE COUNTY OF LACKAWANNA
COMMON PLEAS COURT
CIVIL DIVISION—APPEAL

No. 562 March Term, 1969

In Re: Condemnation of Lands in the City of Scranton, County of Lackawanna, State of Pennsylvania

vs.

Mary F. McNamara and Anarita McNamara, 518 Adams Avenue, Ward 9, Block 30, Lots 16A & 17

Now, this 18th day of October, 1974, upon consideration of the defendants' Preliminary Objections to the Petition for Writ of Possession, it is hereby ordered that the Preliminary Objections are dismissed for lack of merit on their face.

By the Court
(s) Kosik, J.

Order of Commonwealth Court

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1522 C.D. 1974

In Re: Condemnation of Lands in City of Scranton, County of Lackawanna, State of Pennsylvania

and

TCS-1,
Intervening Appellee

Mary F. McNamara and Anarita McNamara,
Appellants

ORDER

Per Curiam:

Now, October 20, 1975, the order of the lower court is hereby affirmed.

Seal of the Commonwealth Court of Pennsylvania
Certified From the Record
October 20, 1975

(s) Frances C. Barbush
Chief Clerk

Order of Supreme Court of Pennsylvania

SUPREME COURT OF PENNSYLVANIA
Eastern District

Sally Mrvos
Prothonotary
Laura E. Litchard
Deputy Prothonotary

Philadelphia, 19107
February 10, 1976

Mr. Henry M. Biglan
Star Route
Hop Bottom, Pa. 18824

In re: Condemnation of Lands in City of Scranton, County of Lackawanna, State of Pennsylvania, and TCS-1 Intervening Appellee.
Mary F. McNamara and Anarita McNamara, Petitioners.
No. 2153 Allocatur Docket

Dear Mr. Biglan:

Please be advised that the Court has entered the following Order on the Petition for Allowance of Appeal from Judgment of the Commonwealth Court, in the above captioned matter:

"January 28, 1976
Petition Denied
Per Curiam"

Very truly yours,
[Laura E. Litchard]
Deputy Prothonotary

LEL:mb
CC: Leo A. Southard, Esq.,
Joseph E. Gallagher, Esq.

Supreme Court, U. S.
FILED
OCT 29 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976
No. 477

MARY F. McNAMARA and ANARITA McNAMARA,
Petitioners

versus

TCS-1, et al.,
Respondents

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT, TCS-1, IN OPPOSITION

CARLON M. O'MALLEY, SR.,
310 Scranton Electric Building,
Scranton, PA 18503,
Attorney for Respondent, TCS-1

Of Counsel:
JOSEPH E. GALLAGHER,
310 Scranton Electric Building,
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TABLE OF CONTENTS

	PAGE
Question Presented	1
Statement of the Case	2
Argument	5
Conclusion	12

TABLE OF CITATIONS

CASES:

Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962)	5, 6
Combs v. State of Tennessee, 530 F.2d 695 (6th Cir. 1976), cert. denied, 96 S.Ct. 1731 (1976)	7
Delia v. Court of Common Pleas of Cuyahoga County, 418 F.2d 205 (6th Cir. 1969), cert. denied 396 U.S. 886, 90 S.Ct. 174 (1969)	6
Rubin v. Department of Housing and Urban Development, 347 F. Supp. 555 (D.C. Pa. 1972)	8, 9
Smith v. City of Cookeville, 381 F. Supp. 100 (D.C. Tenn. 1974)	9
Stanturf v. Sipes, 335 F.2d 224 (8th Cir. 1964), cert. denied 379 U.S. 997, 85 S.Ct. 676 (1965)	5
Will-Tex Plastics Manufacturing, Inc. v. Department of Housing and Urban Development, 346 F. Supp. 654 (D.C. Pa. 1972)	8, 9

STATUTES:

Pennsylvania Eminent Domain Code, Act of June 22, 1964, P.L. 84, Art. IV, §408, as amended 26 P.S. §1-408 10

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, Jan. 2, 1971, 84 Stat. 1894:

42 U.S.C.A. §§4601-4655 ..... 7, 8

42 U.S.C.A. §§4621-4638 ..... 8, 9

42 U.S.C.A. §§4651-4655 ..... 8, 9

TEXTBOOK:

2A Anderson, Pennsylvania Civil Practice, §1029.-11 ..... 7, 8

Question Presented

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 477

MARY F. McNAMARA and ANARITA McNAMARA,
Petitioners

versus

TCS-1, et al.,
Respondents

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT, TCS-1, IN OPPOSITION

QUESTION PRESENTED

Petitioners set forth no question assertedly presented by the petition. The reasons asserted by Petitioners for granting the writ in fact indicate the question is as follows: "Does a misapplication of state law by a state court constitute a denial of equal protection of the laws under the Fourteenth Amendment?"

STATEMENT OF THE CASE

The Respondents herein are Redevelopment Authority of the City of Scranton (Redevelopment Authority) and TCS-1; the latter a Pennsylvania nonprofit corporation chartered to sponsor, develop and provide housing units under the provisions of the National Housing Act.

The instant petition arises out of an eminent domain proceeding commenced on March 1, 1969, when the Redevelopment Authority filed a declaration of taking for Petitioners' premises located in the City of Scranton, Pennsylvania. Thereafter, on November 12, 1969, the Redevelopment Authority contracted to sell and convey said premises to TCS-1.

The condemnation action has had a lengthy history. Preliminary objections of the Petitioners herein to the declaration of taking were dismissed by the Court of Common Pleas of Lackawanna County, Pennsylvania. An appeal to the Commonwealth Court of Pennsylvania was dismissed. Reconsideration was denied by the Commonwealth Court and a petition for allocatur was denied by the Supreme Court of Pennsylvania.

Petitioners herein then sought an injunction from the United States District Court for the Middle District of Pennsylvania which denied same in June, 1972. An appeal to the United States Court of Appeals for the Third Circuit was dismissed for failure to perfect the appeal.

Thereafter, TCS-1 brought an action against the Redevelopment Authority in the Court of Common Pleas of

Lackawanna County, Pennsylvania, for specific performance of the November 12, 1969, contract to convey the subject premises to TCS-1. This proceeding resulted in a final decree of September 16, 1974, whereby the Redevelopment Authority was ordered to demolish and remove to grade all existing buildings and structures on the subject premises and to execute and deliver a deed to TCS-1 conveying a clear and marketable title to the premises.

In order to comply with the aforesaid mandate, the Redevelopment Authority sought possession of the premises and filed a praecipe for a rule of possession upon which the Court of Common Pleas of Lackawanna County directed Petitioners herein to show cause why they should not deliver up possession of the premises to the Redevelopment Authority. Petitioners herein filed preliminary objections (A. 4a-6a)[1] which were dismissed by the lower court "for lack of merit on their face" (A. 8a)[2] and such action was affirmed per curiam by the Commonwealth Court of Pennsylvania (A. 9a). Petitioners' petition to the Supreme Court of Pennsylvania for allowance of appeal from the Commonwealth Court was denied (A. 9b) as was petitioners' petition to the Supreme Court for reconsideration of the denial of allowance of appeal from the Commonwealth Court to the Supreme Court (A. 1a).

The net effect of the proceedings in the Pennsylvania appellate courts is that the respondent herein, Redevelop-

[1] References to Petitioners' appendix.

[2] On the same day the court made the rule to show cause absolute and awarded judgment of possession to the Redevelopment Authority.

ment Authority, has a final judgment awarding possession of the subject premises to it and that it is now in position to comply with the order of the Court of Common Pleas of Lackawanna County directing it to convey title and possession to respondent herein, TCS-1.[3]

[3] TCS-1 became a party to these proceedings when granted leave to appear as an intervening appellee in the Commonwealth Court of Pennsylvania. The respondent herein, Redevelopment Authority, has not executed on its judgment of possession pending the appellate proceedings in Pennsylvania and the instant petition.

ARGUMENT

Petitioners' position is ambiguous at best. On the one hand they argue that since their preliminary objections to the Redevelopment Authority's petition for writ of possession were endorsed with a notice to plead, under Pennsylvania law the averments in the preliminary objections were admitted in the absence of a responsive answer from the Redevelopment Authority. On the other hand, they contend that a disputed issue of fact in preliminary objections requires the taking of evidence by deposition or otherwise.

From these somewhat inconsistent premises petitioners conclude that when the trial court precluded testimony or deposition and dismissed the preliminary objections because of "lack of merit on their face," Petitioners were denied the equal protection of the laws under the Fourteenth Amendment.

Petitioners' argument comes down to a contention that the Pennsylvania courts from the trial to the appellate level erred in their application of Pennsylvania law. However, "no denial of equal protection is demonstrated unless there is shown intentional or purposeful discrimination between persons or classes." *Stanturf v. Sipes,* 335 F.2d 224, 228 (8th Cir. 1964), *cert. denied,* 379 U.S. 997, 85 S.Ct. 676 (1965). *Beck v. Washington,* 369 U.S. 541, 554-555, 82 S.Ct. 955, 962-963 (1962), pointed out:

> "Such misapplication [of state law] cannot be shown to be an invidious discrimination. We have

said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions * * * [or] immunity from judicial error * * * '. Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U.S. 100, 106, 40 S.Ct. 306, 309, 64 L.Ed. 476 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

Delia v. Court of Common Pleas of Cuyahoga County, 418 F. 2d 205, 206 (6th Cir. 1969), *cert. denied,* 396 U.S. 886, 90 S.Ct. 174 (1969), presented a situation somewhat analagous to the instant petition. Suit was brought on an account in an Ohio court and resulted in a money judgment which was affirmed on appeal. The defendant in the state court action then filed suit in the federal district court seeking a declaratory judgment to set aside the state court judgment on the grounds that the Ohio trial court failed to require of the plaintiff in the Ohio action proof of the elements of the plaintiff's cause of action, thereby denying to the defendant in the state suit "the equal protection of the laws." The court of appeals noted that unequal application of a state law is not a denial of equal protection unless there is shown to be present an element of intentional or purposeful discrimination and concluded:

"If it should be assumed that the Ohio courts did not correctly apply the law of Ohio to appellant's case, there is nevertheless a lack of any allegations in the complaint tending to show a purposeful discrimination. Certainly, a construction of the equal protection clause is not favored which would in effect

allow a federal court to relitigate a state court case upon every alleged departure from state law by state officers."

Similarly, *Combs v. State of Tennessee,* 530 F. 2d 695, 698 (6th Cir. 1976), *cert. denied,* 96 S.Ct. 1731 (1976), held: "Misapplication of State law, absent invidious discrimination, does not necessarily prevent a federal constitutional question."

It is submitted that even if the Pennsylvania Supreme Court erred in its application of state law, such action was not a denial of Petitioners' right of equal protection of the laws. The petition for certiorari should be denied.

Aside from the foregoing constitutional basis, it is to be noted there was no misapplication of law by the Pennsylvania courts. Petitioners' preliminary objections in the Pennsylvania trial court were twofold: a motion to strike off the petition for writ of possession on the grounds that the Redevelopment Authority had no legal right to sue for possession of Petitioners' premises until it had conformed to the mandate of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, Jan. 2, 1971, 84 Stat. 1894, 42 U.S.C.A. §§4601-4655 (Act), and a contention that the Redevelopment Authority was estopped to acquire possession (A. 4a-5a). They will be considered seriatim.

Initially it is to be noted that only facts which are properly pleaded are admitted by a failure to answer. 2A *Anderson, Pennsylvania Civil Practice,* §1029.11 at pp. 563-564, states:

"A party is not required to answer facts which are not well pleaded. Accordingly, there was no

necessity of filing an answer to a preliminary objection in the nature of a demurrer when the demurrer improperly avers facts and is a speaking demurrer.

No answer is required to conclusions of law, and they are not admitted by failing to deny them in a responsive pleading. Hence the failure to plead to averments in a preliminary objection endorsed with a notice to plead is not an admission where such admissions are not averments of fact but merely conclusions of law . . .".

Petitioners' motion to strike off the praecipe for the writ of possession did not allege any relevant or material facts demonstrating that the Redevelopment Authority failed in any manner to comply with the Act. It is not surprising that the trial court viewed the bald allegations of Petitioners' preliminary objections to be patently insufficient on their face.

Further, the Act is in three parts: Subchapter I contains general provisions (42 U.S.C.A. §§4601, 4602); Subchapter II governs relocation assistance to be rendered to displaced persons (42 U.S.C.A. §§4621-4638); Subchapter III governs real property acquisition to implement federally assisted programs (42 U.S.C.A. §§4651-4655). See *Rubin v. Department of Housing and Urban Development,* 347 F. Supp. 555, 557 (D.C. Pa. 1972).

A "displaced person" is defined in the Act as being "any person who . . . moves from real property . . . as the result of the written order of the acquiring agency to vacate real property . . ." 42 U.S.C.A. §4601 (6). Since Petitioners are still in possession of the subject property, they are not entitled to any relief under Subchapter II as a displaced person. *Will-Tex Plastics Manufacturing,*

Inc. v. Department of Housing and Urban Development, 346 F. Supp. 654, 657 (D.C. Pa. 1972). In any event, petitioners herein made no allegation in their preliminary objections that the Redevelopment Authority failed to comply with any provisions of Subchapter II of the regulations thereunder. *Will-Tex Plastics,* supra. Finally, the Act and the regulations thereunder "provide administrative remedies for persons aggrieved by actions within the purview of the Act," *Smith v. City of Cookeville,* 381 F. Supp. 100, 106 (D.C. Tenn. 1974), and the Petitioners made no allegation in their preliminary objections that they had taken recourse to, let alone exhausted, the administrative remedies.

Subchapter III is applicable only to real property acquired after January 2, 1971. *Rubin v. Department of Housing and Urban Development,* 347 F. Supp. 555, 557-558 (D.C. Pa. 1972); *Will-Tex Plastics Manufacturing, Inc. v. Department of Housing and Urban Development,* 346 F. Supp. 654, 657-659 (D.C. Pa. 1972). The subject property was acquired by the Redevelopment Authority by condemnation upon the filing of the declaration of taking on March 1, 1969. Thus Subchapter III was not applicable.

Therefore, not only did Petitioners in their preliminary objections fail to allege any facts showing in what manner the Redevelopment Authority failed to comply with the provisions of the Act but also Petitioners could not claim any relief under Subchapter II of the Act as they are not a "displaced person" and they cannot make any claim under Subchapter III as Petitioners' property was acquired on March 1, 1969, which was prior to the effective date of the Act.

The alleged estoppel of the Redevelopment Authority to acquire possession of Petitioners' premises was based upon four grounds:

(a) The Chairman of the Board of the Redevelopment Authority allegedly stated that the Authority did not choose to take title to Petitioners' property. Two short answers are in order: first, the chairman alone could not bind the Authority and second, Sec. 408 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, P.L. 84, Art. IV, §408, as amended 26 P.S. §1-408, provides a procedure for the revocation of condemnation proceedings. Suffice to say that the Redevelopment Authority did not resort to such procedure. In truth, the Redevelopment Authority could not very well relinquish the subject property because it is under the guns of the lower court's mandatory injunction to sell and convey Petitioners' property to the respondent herein, TCS-1.

(b) As for the status of TCS-1, suffice to note that the lower court, in the action for specific performance of the contract between the Redevelopment Authority and TCS-1, had already found as a fact that TCS-1 had corporate status when the Redevelopment Authority was ordered to perform its contract with it. Understandably, the trial court was not detained with this objection.

(c) The negotiations between Petitioners and the Redevelopment Authority were patently insufficient to create an estoppel.

(d) The preliminary objections obliquely raised the constitutionality of the Pennsylvania Eminent Domain Code. However, that issue was not even alluded to in Petitioners' brief in the Commonwealth Court of Pennsylvania.

In light of the foregoing, it is quite apparent why the trial court considered the Petitioners' preliminary objections, with immaterial and irrelevant allegations, were devoid of merit on their face.

The trial court of Lackawanna County, Pennsylvania, was no stranger to this matter. After almost six years of litigation, that court saw through the tenuous allegations of estoppel and readily perceived the veiled reference to the Act was a poor substitute for specific averments of how, when and where the Redevelopment Authority had failed to comply with the statute. Understandably, the trial court dismissed the preliminary objections out of hand.

CONCLUSION

It is respectfully submitted that Petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. Even if the Pennsylvania Supreme Court misapplied state law, such misapplication does not constitute an invidious discrimination so as to deny Petitioners the equal protection of the laws. In point of fact, moreover, the Pennsylvania courts did not misapply state law. The petition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1976
No. 477

MARY F. MC NAMARA and ANARITA MC NAMARA,
Petitioners

Versus

REDEVELOPMENT AUTHORITY OF THE CITY OF SCRANTON, et al.,
Respondents

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT REDEVELOPMENT AUTHORITY OF THE CITY OF SCRANTON, IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Question Presented	1
Statement of the Case	2
Argument	4
Conclusion	6

TABLE OF CASES

Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962)	4
Delia v. Court of Common Pleas of Cuyahoga County, 418 F.2d 205 (6th Cir. 1969), cert. denied 396 U.S. 886, 90 S.Ct. 174 (1969)	5
Stanturf v. Sipes, 335 F.2d 224 (8th Cir. 1964), cert. denied 379 U.S. 997, 85 S.Ct. 676 (1965)	4, 5

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BRIEF FOR RESPONDENT, REDEVELOPMENT AUTHORITY OF THE CITY OF SCRANTON, IN OPPOSITION

QUESTION PRESENTED

Does an alleged misapplication of state law by a state court constitute a denial of equal protection of the laws under the Fourteenth Amendment?

STATEMENT OF THE CASE

The respondents herein are Redevelopment Authority of the City of Scranton (Redevelopment Authority), a corporation engaged in the planning and implementation of urban renewal projects of the City of Scranton, Commonwealth of Pennsylvania, and TCS-1, the latter a Pennsylvania nonprofit corporation chartered to sponsor, develop and provide housing units under the provisions of the National Housing Act.

On March 1, 1969, the Redevelopment Authority instituted eminent domain proceedings against property located in the City of Scranton which was owned by the Petitioners herein. On November 12, 1969, the Redevelopment Authority entered into a contract to convey the subject premises to TCS-1 for the purpose of developing the area in which the property was located and to provide housing.

Petitioners herein filed preliminary objections to the Redevelopment Authority's declaration of taking in the Court of Common Pleas of Lackawanna County, Pennsylvania. These objections were dismissed. Petitioners' subsequent appeal to the Commonwealth Court of Pennsylvania was also dismissed. Reconsideration was applied for and denied by the Commonwealth Court and a petition for allocatur was denied by the Supreme Court of Pennsylvania.

Petitioners then sought relief in the Federal Courts by means of a petition for an injunction for the United

States District Court for the Middle District of Pennsylvania. The appeal to the United States Court of Appeals for the Third Circuit followed. This appeal was dismissed for failure to perfect the appeal.

At the conclusion of the above events, TCS-1 brought an action against Respondent Redevelopment Authority in the Court of Common Pleas of Lackawanna County, Pennsylvania for specific performance of the aforementioned contract to convey. On September 16, 1974, a final decree in this proceeding was entered ordering the Redevelopment Authority to demolish and remove to grade all existing buildings and structures on the subject premises and to execute and deliver a deed to Respondent TCS-1 conveying a clear and marketable title to the premises.

Respondent Redevelopment Authority in an attempt to comply with the aforesaid decree filed a praecipe for a rule of possession in the Court of Common Pleas of Lackawanna County which directed Petitioners herein to show cause why they should not deliver up possession of the subject premises to the Redevelopment Authority.

The current posture of these lengthy proceedings is that the Redevelopment Authority, by means of the final judgment awarding possession of the subject premises to it, is now in a position to comply with the aforesaid order of the Court of Common Pleas of Lackawanna County which directed it to convey title and possession to Respondent herein, TCS-1 . However, Respondent Redevelopment Authority has not yet executed on its judgment of possession pending this proceeding before your Honorable Court.

ARGUMENT

It appears to be Petitioners' contention that when the trial court dismissed their preliminary objections to Respondent Redevelopment Authority's praecipe for a rule of possession because of "lack of merit on their face", that Petitioners were denied equal protection on the laws under the Fourteenth Amendment.

The Pennsylvania courts did not misapply its state law in the intent situation. However, even assuming that its court did err, it is our contention that such a misapplication is not a denial of equal protection under the Fourteenth Amendment. In *Beck v. Washington,* 369 U.S. 541, 554-555, 82 S.Ct. 955, 962-963 (1962), it is stated that:

> "Such misapplication (of state law) cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not assure uniformity of judicial decisions *** (or) immunity from judicial error ***. Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U.S. 100, 106, 40 S.Ct. 306, 309, 64 L.Ed. 476 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

Additionally, the Eighth Circuit Court of Appeals stated that: "No denial of equal protection is demonstrated unless there is shown intentional or purposeful discrimination between persons or classes." *Stanturf v.*

Sipes, 335 F.2d 224, 228 (8th Cir. 1964), *cert. denied,* 379 U.S. 997, 85 S.Ct. 676 (1965). We have no such discrimination involved in the present matter.

Another analogous situation presents itself in *Delia v. Court of Common Pleas of Cuyahoga County,* 418 F. 2d 205, 206 (6th Cir. 1969), *cert. denied,* 396 U.S. 886, 90 S.Ct. 174 (1969). There the Court concluded that:

> "If it should be assumed that the Ohio courts did not correctly apply the law of Ohio to appellant's case, there is nevertheless a lack of any allegations in the complaint tending to show a purposeful discrimination. Certainly, a construction of the equal protection clause is not favored which would in effect allow a federal court to relitigate a state court case upon every alleged departure from state law by state officers."

The Respondent herein, Redevelopment Authority, hereby states that it adopts the arguments and conclusions as set forth in Respondent TCS-1's brief in opposition to the Petitioners' petition for writ of certiorari.

CONCLUSION

It is respectfully submitted that the misapplication of state law, as alleged, was not a denial of Petitioners' right to equal protection of the law under the Fourteenth Amendment. The petition for certiorari should be denied.

Respectfully submitted,

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